In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 739

METLOX MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 39–45) is reported at 378 F. 2d 728. The Board's decision and order (Pet. App. 1–32) are reported at 153 NLRB 1388.

JURISDICTION

The revised decision of the court of appeals was rendered on May 5, 1967 (Pet. App. 39), and a decree was entered on July 21, 1967 (Pet. App. 46). The petition for a writ of certiorari was filed on October 18, 1967. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

282-240—67

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the employer violated his statutory obligation to bargain in good faith by refusing, during the course of contract negotiations, to furnish financial information to permit the union to evaluate the employer's asserted inability to pay a wage increase.

2. Whether there is substantial evidence to support the Board's finding that the strike in which the employees engaged was caused by their employer's unfair labor practices.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at pp. 3–4 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On June 11, 1963, the Union[1] was certified as the exclusive collective bargaining representative of petitioner's employees (Pet. App. 5–6). Negotiations between the parties began on November 18, 1963, when the Union submitted contract proposals calling for a wage increase of 35 cents an hour and fringe benefits (Pet. App. 8; G.C. Ex. 2(b), pp. 23–24). The Company rejected the proposal on November 29, claiming that it was financially unable to grant any wage increase (Pet. App. 8; G.C. Ex. 2(b), pp. 25, 46, 86). On December 18, 1963, the Union requested that the

[1] International Brotherhood of Operative Potters, AFL-CIO.

Company's financial records be made available to its auditor (Pet. App. 8; G.C. Ex. 2(c), pp. 93–94). The Company responded by supplying the Union with a statement of the Company's profit and loss figures for the calendar years 1961, 1962, and the first 10 months of 1963 (Pet. App. 8–9; G.C. Ex. 4).

On January 17, 1964, the Union advised the Company that, "[i]n our opinion * * * your summary of financial items is insufficient to enable the union to meet its obligations of bargaining in good faith." The Union requested "information and data" substantiating the figures set forth in the profit and loss statement. It also requested that this information be supplied through an audit conducted by a mutually acceptable certified public accountant (R. 10; G.C. Ex. 3(a)).

The Company agreed to an inspection of its financial records by an accountant chosen by the Union, on the conditions that the accountant would not disclose the "details of the Company's financial records * * * to any third parties whatsoever, including the Union" and that he would only inform the Union whether or not the representations contained in the profit and loss statement "were true" (Pet. App. 10–11; G.C. 3(d)). The Union objected to these conditions, stating that the proposed restrictions upon its access to the details of the Company's financial records precluded it from making an intelligent assessment of the Company's claim of financial inability to grant wage increases (Pet. App. 12, 14–15; G.C. Exs. 2 (e) and (g)). In turn, the Company continued to

"stand on our right not to have the details of the various classifications of expense, other than that pertaining to the factory and shipping employees, made available to the Union for any purpose" (Pet. App. 15–17; G.C. Ex. 3(h)).

Throughout the negotiations, the Union met periodically with the employees to inform them of any developments. The employees were told of the Company's claim that it was financially unable to pay higher wages and that a request had been made to examine the Company's books (Pet. App. 23; Tr. 154–157). On February 20, 1964, the Union informed the employees that little headway was being made in their request to have the Company's books opened and "if there was no decision reached on it [it] would be forced to file refusal-to-bargain charges" (R. 23; Tr. 160, 157–158). On March 4, the employees were told that the Union had received a profit and loss statement, but that it contained insufficient information. The employees were also told that an unfair labor practice charge had been filed (Pet. App. 23; Tr. 161–163). On March 11 the employees voted in favor of a strike but no date was set (Pet. App. 23; Tr. 163). On April 1 the Union reported that no progress was being made and that the only alternative was to strike (Pet. App. 23–24; Tr. 166–167). The strike commenced on April 2, 1964 (Pet. App. 24; Tr. 168).

B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

Upon the foregoing facts, the Board found that the Company had violated Section 8(a) (5) and (1) of

the National Labor Relations Act by unduly restricting the Union's examination of its financial records for the purpose of evaluating the Company's claimed inability to grant a wage increase. The Board also found that the strike was caused by the Company's refusal to bargain in good faith. The Board ordered the Company to cease and desist from the unfair labor practices found and upon application to reinstate the striking employees with backpay (Pet. App. 1–3, 17–32).[2]

The court of appeals sustained the Board's finding that "it was inconsistent with good faith bargaining to insist upon limiting disclosure by the accountant to the Union to a naked 'yes or no' answer as to whether the profit and loss statements furnished by the Company fairly reflected the Company's financial condition. A reasonable amount of explanation and elaboration seems not only to be relevant but also 'reasonably necessary' to enable the Union, in its role as bargaining agent, to form a fair judgment as to the Company's claimed inability to meet any of the Union's demands" (Pet. App. 41–42). The court accordingly

[2] With respect to the steps the Company is required to take to comply with the Board's order, the Trial Examiner, whose decision the Board adopted, stated (Pet. App. 23):

> I find that Respondent in limiting the accountant to a "yes or no" report is not substantiating or permitting substantiation of its inability-to-pay plea, and by this conduct it has not bargained in good faith. I cannot with preciseness indicate here the scope that the accountant's report should take. Elaboration or explanation of his conclusions should be permitted; on the other hand, the report need not be an efficiency survey and critique. [Footnote omitted.]

sustained the Board's findings and enforced its order in full (Pet. App. 42).[3]

ARGUMENT

The decision of the court of appeals, which turns on the particular facts of this case, is correct and is not in conflict with the decisions of this Court or those of any other circuit. There is no occasion for further review.

1. This Court has recognized that an employer violates his statutory obligation to bargain in good faith if he refuses during the course of contract negotiations to produce information substantiating a claim that he cannot afford to grant a wage increase. The Court has said that, if an asserted inability to pay an increase in wages "is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy" *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152–153. Petitioner does not question this principle. It presents only the narrow issue whether its offer to permit the Union accountant to examine its records solely for the purpose of reporting to the Union whether the Company's profit and loss statements were true or false satisfied its obligation under the *Truitt* rule. The Board and the court below properly concluded that the limited disclosure would not enable the Union to make "a fair judgment" as to the Company's claimed inability to grant

[3] One member of the court of appeals concurred with the majority as to the violation found, but would have modified the Board's order (Pet. App. 42–45).

wage increases (Pet. App. 41–42, 21–22). As the Board pointed out, on the basis of expert testimony in the record, a profit and loss summary does not necessarily reflect an accurate picture of a company's financial condition. It is simply one factor to consider in arriving at a judgment as to the Company's financial condition (Pet. App. 19–21, 44; Tr. 67–69, 71, 77, 79–80, 83–84, 86–92, 98, 103–105, 115–116). The inadequacy of such a statement necessarily requires "a reasonable amount of explanation and elaboration" to permit the Union to perform its functions in an intelligent and meaningful fashion.

Contrary to petitioner's contention (Pet. 10–11), there is no conflict between the decision below and *Fruit and Vegetables Packers, Etc.* v. *National Labor Relations Board,* 316 F. 2d 389 (C.A.D.C.). There, unlike here, the employer made available to a union-designated accountant its books and records without limiting the information he could give to the union. The only conditions that the employer sought to impose over the union's objection and that the Board and the court of appeals held to be permissible were that questions concerning the employer's records would be directed to its accountant and that the union would designate a licensed public accountant.[4]

[4] The Board's decision in *Albany Garage, Inc.*, 126 NLRB 417, cited by petitioner (Pet. 11), is also distinguishable from the instant case. There, the employer furnished to the union its financial statement, together with a comparative sales and profit statement. The accuracy of those statements was not questioned nor had the union in its prior negotiations with the employer rejected them as inadequate. In those circumstances

Petitioner's further contention (Pet. 9) that the Board's order, as enforced by the court below, does not enable it to determine what additional disclosure it must make to the Union is insubstantial. The Board's order requires petitioner to cease and desist from refusing to bargain collectively "by refusing, upon request, to substantiate its claim of inability to pay any wage increase or other monetary benefits" (Pet. App. 28). Precisely what information may be necessary to substantiate petitioner's claim of inability to pay cannot of course be pin-pointed in advance of a requested analysis of respondent's accounting practices, their consistency from year to year, the treatment accorded inventory, depreciation, and any non-recurring or unusual items, and other matters familiar to accountancy. The particular categories of information that the designated accountant may require will thus depend on the problems of financial analysis he encounters in the circumstances of petitioner's business. Nevertheless, the Board's order does afford a reasonable standard: Petitioner must supply the information needed for evaluation of the claim that it laid on the bargaining table.

2. Petitioner also contends (Pet. 13–14) that the court below erred in affirming the Board's finding that the strike of April 2, 1964, resulted from the Company's refusal to bargain in good faith with the Union.[5] This presents only an evidentiary issue which

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the Board concluded that it was unneccessary for the union to have access to the books and records of the employer in order to assess the latter's claimed inability to grant wage increases.

[5] "It is well established that 'a strike may be an unfair labor practice strike even though it also has economic objectives.'"

does not warrant further review. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502–503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. In any event, the facts summarized in the Statement, *supra*, pp. 2–4, show that the Board's findings are adequately supported by the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967.

National Labor Relations Board v. *Sea-Land Service, Inc.*, 356 F. 2d 955, 965 (C.A. 1). See also *National Labor Relations Board* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269, (C.A. 2); *National Labor Relations Board* v. *My Store, Inc.*, 345 F. 2d 494, 498 (C.A. 7), certiorari denied, 382 U.S. 927.

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